

Fair Political Practices Commission

Memorandum

To: Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

From: John W. Wallace, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: September 2001 Work Plan revisions and Proposition 34 Opinions/Regulations

Date: August 31, 2001

I. INTRODUCTION

In November 2000, the Commission approved a regulatory work plan for calendar year 2001.¹ The plan provides for quarterly work plan revisions. Attached is the September update to the regulatory work plan for calendar year 2001.

For ease of use, we have numbered each of the items on the calendar. Currently, there are 34 items on the regulation calendar. Section II of the memorandum discusses recommended revisions to non-Proposition 34 items, and Section III discusses recommended revisions to Proposition 34 items. The last section, Section IV, details items (both Proposition 34 and non-Proposition 34) that staff recommends the Commission defer until calendar year 2002 or later.

II. NON-PROPOSITION 34

Items 2-5² ((2) Phase 2 Review (Overview); (3) §87103-Reg. 18706, Standard of Care and Foreseeability Issues; (4) §87103-Reg. 18707.4, Public Generally, Appointed Board and Commissions. Clarification of the term “economic interests;” (5) §87101-Reg. 18708 (Substantial compliance with Legally Required Participation)).

CHANGE. In December 2000, the Commission completed Phase 2 of the Conflict of Interest Regulatory Improvement Project. In October, the staff is presently scheduled to submit a memorandum that provides a progress report on implementation of the regulatory changes. (See Attachment A, FPPC Regulation and Project Calendar for Calendar Year 2001.) This has not changed. The only change to this planned process was that on July 27, 2001, staff held an “interested persons” meeting regarding all the conflict of interest issues. Staff also circulated a survey regarding the effectiveness of the Phase 2 changes prior to that meeting.

¹ See staff memo dated October 24, 2000, *Approval of Regulatory Calendar for the Year 2001*.

² Items 1 and 11 have been completed and will not be discussed. The Commission deferred Item 6 to the 2002 regulatory calendar.

The staff contemplates that there will be a need for clean-up regulatory action and has added pre-notice discussion of any proposed regulatory action for that month. Adoption of any necessary changes would occur in December.

Staff anticipates dealing with all of the conflict of interest regulations as a single packet, although regulatory language on some of the items may need to be taken up at a future date. Issues to be presented to the Commission in October include:

- §87103-Reg. 18706, Standard of Care and Foreseeability Issues (status report).
- §87103-Reg. 18707.4, Public Generally, Appointed Board and Commissions. Clarification of the term “economic interests” (pre-notice).
- §87101-Reg. 18708 (Substantial compliance with Legally Required Participation) (pre-notice).
- §87103-Reg. 18707.3, Public Generally, Small Jurisdictions. Does regulation 18707.3 need revision in order to adapt to the Phase 2 changes which took effect last February? Clarification of the term “economic interests” (status report).

Item 9. Fontana Opinion.

NO CHANGE. Fontana Opinion and LAFCO proceedings. Last year, at the request of the City of Los Angeles Ethics Commission, the Commission undertook a review of campaign reporting rules as they apply to LAFCO proceedings. Commission staff is scheduled to provide a status report regarding implementation of certain new laws impacting these proceedings. The status report is set for the September meeting.

III. PROPOSITION 34

Proposition 34 was passed by the voters on November 7, 2000. Proposition 34 established contribution and expenditure limits for state candidates and includes other provisions discussed in more detail below. The laws were in effect as of January 1, 2001, but most of the chapter 5 provisions of Proposition 34 are not applicable to statewide officers until November 6, 2002.

Section III of this memorandum discusses regulatory action approved by the Commission to implement Proposition 34. The proposed changes reflect, in large part, additional work required to provide for certain campaign reporting requirements added by Proposition 34. The remaining part of this memorandum is structured on a month-by-month basis.³

³ Items 12 - 14 have been completed and are not discussed herein. Item 16 was removed from consideration by the Commission after public comments that the regulation was not necessary.

SEPTEMBER 2001

PRE-NOTICE DISCUSSION

Item 27. §85307 – Personal Loans and Extensions of Credit

NO CHANGE. Section 85307 provides that the provisions in Proposition 34 apply to extensions of credit. Proposition 34 does not define “extensions of credit.” For example, at what point does an unpaid bill become an extension of credit?

In addition, section 85307 prohibits a candidate for elective state office from personally loaning to his or her campaign an amount, the outstanding balance of which exceeds \$100,000. However, it is unclear what types of loans are considered personal loans subject to the \$100,000 prohibition. For example, does the \$100,000 limit apply to loans made by a business wholly owned by a candidate and his or her immediate family? Finally, how does the \$100,000 limit affect outstanding loan balances that existed before January 1, 2001? The Commission approved consideration of a regulation defining “extensions of credit” and “personal loans” for purposes of section 85307. A working group meeting was held on this issue in May 30, 2001.

Item 31. §§84501-84510: Advertising Disclosure (New item 24: §84511: Spokesperson Disclosure).

CHANGE: These provisions are surviving provisions added by Proposition 208 and require the disclosure of major donors to campaign committees that fund campaign advertisements. However, interpretive issues exist with respect to the entire scheme. For example, it is unclear whether advertisements for or against a ballot measure are subject to sections 84502-84504 or section 84506 (governing independent expenditures). The term “cumulative contributions” as defined in section 84502 is also problematic. This item will consist of a global look at the entire disclosure scheme and the presentation of clarifying amendments. Staff held a working group meeting in June.

Formerly, this item included section 84511 which sets forth requirements applicable to paid spokespersons (added by Proposition 34). Section 84511 provides that any individual who appears in an advertisement to support or oppose the qualification, passage, or defeat of a ballot measure and who has been paid or promised payment of \$5,000 or more for that appearance shall disclose that payment or promised payment in a manner prescribed by the Commission. The advertisement shall include the statement; “(spokesperson’s name) is being paid by this campaign or its donors.”

Recommendation: Staff initially proposed that the Commission consider sections 84501 through 84511 as a package, despite the different sources of the disclosure statutes. Staff now proposes separating out the regulatory interpretation of section 84511 and making it a separate item (item 24). In item 24, the Commission would be able to consider both the substance of section 84511 and the proposed forms needed to implement the new statute in a single package.

However, staff recommends that both these section 84511 issues be held until the legislation amending section 84511 is enacted. Thus, all the anticipated regulatory action pertaining to section 85411 is currently not set for any specific meeting.

Item 32. Section §§85205/85303 -Definition of “Political Party Committee.”

CHANGE. Section 85303 provides limitations on contributions for the purpose of making contributions to candidates for elective state office. Section 85303 also provides a higher contribution limit for political party committees. However, which organizations fall within this section is not clearly delineated. Staff held a working group meeting on these issues in July, and pre-notice discussion was to be in September with adoption in November of 2001. This item has been moved to an October pre-notice and merged with item 33 interpreting section 85312, membership communications.

Recommendation: Staff proposes to define “political party” for purposes of this statute. However, because the entity proposed to be defined in this section is also dealt with in section 85312 (item 33), staff proposes merging these two items. Pre-notice discussion of the merged items will occur in October with proposed adoption in December 2001.

Item 34: §85702 (Lobbyist Contributions):

NO CHANGE. Section 85702 prohibits contributions by a lobbyist to elected state officers or candidates for elected state office, if the lobbyist is registered to lobby the government agency of the elected state officer or the agency to which the candidate seeks election. Proposition 208 contained a similar (but broader) prohibition, construed and applied by regulation 18626 (repealed). Staff proposes redrafting the 208 regulation for pre-notice discussion in September 2001 and adoption in November of 2001.

ADOPTION

Item 15: §85304 - Candidate/Officeholder’s Legal Defense Fund.

CHANGE: Section 85304, added by Proposition 34, states that a candidate for elective state office or an elected state officer may establish a separate account to raise funds to pay legal costs incurred as a result of legal proceedings arising out of the conduct of an election campaign or the performance of the official’s duties. This is an exception not only to the “one-bank-account” rule but also to the contribution limits established by Proposition 34. All contributions, however, must be disclosed in a manner prescribed by the Commission.

This item was set for pre-notice in June and adoption in August. At the Commission’s direction, the pre-notice hearing was moved to July. Adoption will be at the September Commission meeting.

Item 17: §85700 - Disclosure of Contributor Information; Return of Contributions.

CHANGE: Proposition 34 requires a candidate or committee return within 60 days a contribution of \$100 or more for which the candidate or committee does not have on file in its records the name, address, occupation and employer of the contributor. Questions have arisen whether multiple contributions in increments under \$100 by the same contributor are to be aggregated for purposes of the statute. Also uncertain is whether the information described above is to be disclosed on committee campaign reports or whether it is sufficient merely to have the information on file.

This item was set for pre-notice in June and adoption in August. At the Commission's direction, the pre-notice hearing was moved to July. Adoption will be at the September Commission meeting.

Item 28: §85316 -- Calculating Net Debts Outstanding After an Election.

CHANGE. Effective January 1, 2001, the Act imposes limitations on post-election fundraising. Section 85316 provides:

“A contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.”

At the June 8, 2001 Commission meeting, the Commission decided that neither section 85316 nor Proposition 34's contribution limits (found in sections 85301 and 85302) apply to pre-2001 elections.

Pre-notice discussion occurred at the June 2001 meeting as planned. However, the regulation was presented for a second pre-notice hearing in July. Consequently, the adoption hearing was moved to September 2001.

OCTOBER 2001

PRE-NOTICE DISCUSSION

Item 25: §§85200, 85201 and 85317 - One Bank Account Rule Issues.

CHANGE. In May, the staff asked the Commission to add consideration of amendments to existing Commission regulations concerning the “one-bank-account” rule under the Act. The staff identified three specific issues in a policy memorandum presented at the July 2001 Commission meeting. These issues were: (1) the continuing viability of the “redesignation” rule; (2) the continuing viability of regulation 18525 which allowed payments for “officeholder

expenses” for a current term of office to be made from a future campaign bank account established for re-election to the same office; and (3) how broadly sections 85317’s “carry over” provision should be construed.

This item was originally set for pre-notice discussion or emergency adoption at the July 2001 Commission meeting. Due to the complexity of the issues staff presented this item as an issue memorandum outlining the issues. The Commission requested a working group meeting and a meeting was conducted in July. Regulations were presented for pre-notice discussion in August and the Commission directed staff to return with a second pre-notice discussion in October for adoption in December. Please note that the “carry over” issue was merged into this item from item 19.

Item 26. Termination of Committees.

CHANGE. This new item, dealing with new issues that arose in the discussion of the “one-bank-account” rule in item 25, concerns a regulation that requires termination of campaign committees. The proposed rule would establish definitive timelines for the closure of committees after an election has been held. It also discusses administrative termination and establishes an appeal system from this mandatory closure rule. At the direction of the Commission, this item will be considered for additional pre-notice at the October meeting and adoption in December.

Item 30. Aggregation of Contributions.

CHANGE. The issue of aggregation of contributions arises in the context of both disclosure and contribution limits. Regulation 18428 addresses the disclosure and notification requirements of affiliated entities that participate in the financing of elections. (Section 84211.) Originally, regulation 18428 implemented the Commission’s *Kahn* ((1976) 2 FPPC Ops. 151) and *Lumsdon* ((1976) 2 FPPC Ops. 140) opinions requiring a “combination of persons” to file one campaign statement. The regulation defined “affiliated entities” as “a person or group of persons whose campaign contributions are directed and controlled by another.” This is the first appearance of a “direction and control” test. This standard remained on the books until 1996.

In 1996, the voters passed Proposition 208 and imposed a different standard for aggregating contributions: “All payments made by a person established, financed, maintained, or controlled by any business entity, labor organization, association, political party, or any other person or group of such persons shall be considered to be made by a single person.” To implement Proposition 208, the Commission adopted regulation 18531.1. Regulation 18531.1 was a separate affiliation regulation added for purposes of the Proposition 208 contribution limits. This regulation was repealed as part of the Proposition 208 and 73 clean-up packet.

Section 85311 of Proposition 34 codifies former regulation 18215.1 and establishes a “direction and control” standard for determining whether entities should aggregate their

contributions. Thus, section 85311 appears to codify a standard that was in effect before the passage of Proposition 208.

Staff Recommendation: The Commission was to consider issues raised by regulations 18428, 18215.1, 18225.4, and 18531.1 and possibly adopt a new affiliation regulation applicable to the contribution limits of Proposition 34. A working group meeting was scheduled for July, with pre-notice discussion in September and adoption in November 2001. Due to the continuing number of items to be considered by the Commission in September and staffing changes, staff recommends pushing each of these events back one month. A working group meeting has been scheduled for August with pre-notice discussion to occur in October, and adoption in December 2001.

Item 33: §§ 85312, 85205 and 85303, Member communications (definition of terms “member,” “employee,” “shareholder,” “families,” “communications,” and “organization”), definition of “Political Party Committee.”

CHANGE: Section 85312 provides that certain payments for communications to “members, employees, shareholders, or families of members, employees, or shareholders of an organization” are not contributions or independent expenditures. While the Act currently provides a definition for the term “immediate family” pertaining to conflict of interest and disclosure rules, the term “families” as used in section 85312 may be interpreted more broadly. Similarly, other undefined terms of this section including “member,” “employee,” “shareholder,” “communications,” and “organization” warrant examination and definition by the Commission.

A regulation defining these terms was to be heard for pre-notice discussion in July. However, a second working group meeting was held in August. Pre-notice is set for October and adoption in December. Note that item 32 interpreting section 85303, political parties, was merged into this item.

Item 18: §§85305 and 85306: Attribution of contributions being transferred/ election of LIFO or FIFO accounting method; transfers from one candidate to another.

CHANGE: Prior to January 1, 2001, the Political Reform Act (“the Act”) allowed most transfers of funds between a candidate’s campaign accounts without limits or detailed reporting requirements. The one exception to that rule was the requirement that transfers of funds to a special election committee be “attributed” to specific contributors and subject to the contribution limits enacted by Proposition 73. Implicit in the concept of attribution is the requirement that the total transferred funds attributed to a particular contributor cannot exceed the amount that person actually contributed.

Effective January 1, 2001, Proposition 34 enacted a system of contribution limits and expenditure ceilings applicable to candidates for elective state office and to persons who contribute money to them. The measure included a provision, similar to the rules under Proposition 73, dealing with transfers from a candidate’s own committee to the same candidate’s

committee for elective state office. This item discusses the issues involved in these transfers and briefs decision points in the attached draft regulation 18536 where options are presented. Staff recommends approval of the regulation for adoption in July 2001.

This item has gone through a series of changes since June. First, item 18 which is set forth herein is actually the merger of two projects in the June update (dealing with sections 85305 and 85306). In addition, as noted previously, the interpretation of section 85317 (the “carry over” provision) has been separated from the interpretation of section 85306 and has been merged into item 25. Finally, the June second pre-notice hearing was changed to emergency adoption was changed to July, at the Commission’s request, with final adoption in October.

Item 21: Forms/Reports – §§85400 – 85402, 85309, 85310 and 85500; Regs. 18421.4, 18539, 18539.2, and 18550.

NO CHANGE: Proposition 34 established three new campaign disclosure reports that must be filed online or electronically with the Secretary of State. Emergency regulations are being proposed to implement these new reporting provisions. Legislative changes to the Act went into effect January 1, 2001, necessitating revisions to Recipient Committee Campaign Statement (Form 460). In addition, in May 2001, the Commission authorized changes to the Form 460 to provide for disclosure related to Proposition 34. The revised Form 460 was presented for approval, along with conforming changes to Forms 450, 461, 465, and 497. Forms 496 and 501, with revisions necessitated by Proposition 34, were also presented for approval. Regulation 18421.4 and 18542 were proposed to implement the form changes.

Item 22: §§85400 – 85402, Re-Enact Reg. 18542, Voluntary Expenditure Limits (§85402(b)) Reg. regarding monitoring candidates’ personal contributions to their own campaigns as they approach the expenditure limit and lifting of the expenditure limit.

NO CHANGE: Section 85402(a) provides that a candidate who has accepted the expenditure limit is no longer bound by it if an opposing candidate contributes personal funds to his or her campaign in excess of the limit. Section 85402(b) requires the Commission to establish a procedure for notification by candidates who make personal contributions in excess of the limit. Proposed regulation 18542 was presented to implement section 85402(b). The regulation requires the candidate to file an amended Form 501—Candidate Intention with the Secretary of State by guaranteed overnight or personal delivery. This item was adopted in June 2001 as an emergency adoption and is set for permanent adoption in October 2001.

NOVEMBER 2001

ADOPTION

Item 27. §85307 – Personal Loans and Extensions of Credit. See description of this item under September 2001 pre-notice.

Item 31. §§84501-84510. Advertising Disclosure. See description of this item under September 2001 pre-notice.

Item 34: §85702 (Lobbyist Contributions): See description of this item under September 2001 pre-notice.

DECEMBER 2001

ADOPTION

Item 25: §§85200, 85201 and 85317 - One bank account rule issues. See description of this item under October 2001 pre-notice.

Item 30: §§84211 and 85311-Regs 18215.1; 18225.4; 18428 and new Reg. 18531.1 Aggregation of Contributions; Reporting Requirements and Contribution Limits See description of this item under October 2001 pre-notice.

Item 33: §§ 85312, 85205 and 85303, Member communications (definition of terms “member,” “employee,” “shareholder,” “families,” “communications,” and “organization”), definition of “Political Party Committee.” See description of this item under October 2001 pre-notice.

REGULATION CALENDAR 2002

Staff is proposing that several items (both Proposition 34 and non-34) be moved to the 2002 regulatory calendar or rescheduled to an indefinite future calendar. This is necessary in part due to the continuing implementation of Proposition 34 which has resulted in heavy agendas for the Commission, and also due in part to staff changes.

Item 7. Regulations 18741.1; 18746.1 - Permanent Ban on Post-Employment Activities.

This involves proposed amendments to regulation 18741.1, relating to the “permanent ban” on post-employment activities. Under the Political Reform Act, former officials in state government are prohibited from attempting to influence proceedings involving their former state employer in which they participated when under government employment. (Sections 87401 and 87402.) A former official has “participated” where he or she has had “personal and substantial” involvement in the proceeding. In 1999, the Commission adopted regulation 18741.1 interpreting sections 87401 and 87402. That regulation provides, in pertinent part:

“Any supervisor is deemed to have participated in any proceeding which was ‘pending before,’ as defined in 2 Cal. Code Regs. Section 18438.2, subdivision (b), the official’s agency and which was under his or her supervisory authority....”

In the *Lucas* Opinion, O-00-157, the Commission interpreted this regulation in the context of a high-level official of the Board of Equalization. In so doing, the Commission concluded that even though the official technically had “supervisory authority” over all employees under his chain of command, the official was not a “supervisor” of those employees within the meaning of the regulation, and therefore the official did not participate in audits conducted by the lower-level employees. The Commission distinguished this interpretation with the 1990 Commission interpretation reflected in the *Brown* Advice Letter, No. A-91-033, which applied the ban to the former chief of the Enforcement Division of the Commission.

The Commission instructed staff to amend regulation 18741.1 to reflect this distinction. It is anticipated that other technical changes may also be made to this regulation and regulation 18746.1. Therefore, reference to regulation 18746.1 has been added to the calendar.

Staff Recommendation: Staff recommends placing this regulatory amendment on the calendar for next year. The planned regulatory amendment would be a conforming change, since the *Lucas* Opinion has already resolved the issue, and thus the delay should have no negative effects.

Item 8. Campaign Reporting Project.

Last year, the Commission convened an inter-divisional task force to review the current campaign reporting rules and devise ways to make it easier for candidates and committees to comply with the rules, and for the public and the media to access the information. Staff has met with and is continuing to meet with various interested persons to elicit feedback regarding the current rules and suggestions for improvement. In addition, staff has held internal meetings on campaign reporting. At these meetings, staff has brainstormed and reviewed ideas sent in by the regulated community. Employees throughout the agency have become more familiar with the technical, detailed aspects of reporting by receiving training from the Technical Assistance Division. During the last three months, staff conducted research and obtained first-hand experience with the electronic methods candidates and committees can use to comply with the campaign reporting rules. In addition, staff is planning to present an overview of the current system for the commissioners. The overview will cover the current rules, the purpose behind those rules, and applicable case law. Following the overview, staff will present a detailed work plan for Commission approval.

Staff Recommendation: Staff recommends placing the campaign reporting project on a future calendar. At that time, the project will be better able to consider the substantial changes caused by Proposition 34.

Item 29. Acceptance and Return of Contributions.

Regulation 18215.2, an emergency regulation never permanently adopted, specified when a contribution is “accepted.” Regulation 18531, amended by the Commission for purposes of

Proposition 34 as part of the clean-up packet, describes when a contribution is deemed “not to have been accepted” for purposes of contribution limits. The Commission may wish to utilize language of these two regulations previously adopted for the implementation of Proposition 208. If so, it may be helpful to explore the issue of when a contribution is “accepted” if the conditions of regulation 18531 are not carried out. Clarification on the manner in which a contribution may be made, accepted, or returned may be included in such an examination. Additionally, what effect, if any, section 85319 has on this regulation should be addressed.

In identifying the issues associated with defining and developing rules for making, receiving, accepting, and returning contributions, the issue of electronically transmitted contributions has presented issues that have not been formally addressed by the Commission. Specifically, contributions which are made on websites and paid for by credit cards or made through payroll deductions do not fit in the Commission’s prior rules defining when a contribution is made, received, or accepted. Given the rise in electronically transmitted contributions, staff agrees that examination of this issue warrants additional analysis and specific regulatory language to clarify rules relating to these types of contributions.

Staff Recommendation: Staff recommends placing this item on the calendar for next year. At that time, it may be prudent to pull this item under the campaign reporting project.